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*United States
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THE DIGEST

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United States
Merit Systems Protection Board
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Case Summaries

ADVERSE ACTIONS

Clarence Brown v. U.S. Coast
Guard
NY07528110048ADD
August 14, 1985

When the U.S. Court of Appeals for the Federal Circuit granted the Board's motion to remand this appeal, the Board reopened the case to determine: (1) whether appellant was entitled to attorney's fees in connection with appealing his demotion for work performed contesting his proposed removal; (2) whether fees were warranted in the interest of justice; and (3) whether fees claimed were reasonable.

The background to the case was that in April 1980, after the agency proposed to remove appellant from the position of administrative officer, GS-9, for unsatisfactory performance, the deciding official sustained the charges but mitigated the penalty to a demotion to GS-7.

When appellant appealed to the regional office, the presiding official reversed, finding that only 12 of the 82 cited examples of alleged poor performance were supported by a preponderance of evidence, that the sustained charges did not justify the penalty, that the agency failed to prove that the demotion was necessary to promote the efficiency of the service, and that appellant failed to prove racial discrimination.

On the agency's petition to the Board for review, the Board

affirmed the initial decision, as modified.

On appellant's subsequent motion for attorney fees in connection with contesting the proposed removal, the presiding official found that—even assuming that fees could be awarded for services rendered at the agency level—appellant had not shown that fees were incurred in connection with the demotion appeal. That was because attorney's bill did not specify the legal services performed. The presiding official also found that appellant had not shown that the fees were reasonable.

The Board denied appellant's petition for review, finding that the attorney's statement that he had furnished no services in connection with the demotion constituted additional support for the presiding official's finding that the appellant incurred no fees in connection with the demotion. The attorney said that his agreement was with the appellant in connection with the proposed removal only.

On remand, the Board examined the central legal questions this appeal posed: (1) whether the attorney fee provision in 5 U.S.C. § 7701(g)(1) authorizes the Board to award fees incurred by an appellant in contesting a proposed action before the agency; and (2) if so, whether this authority extends to cases such as this, where the proposed action is mitigated to another action in which the employee prevails, with a different representative, on appeal to the Board.

The statute clearly waives sovereign immunity by authorizing the Board to require the agency to pay reasonable fees to prevailing appellants. It does not limit the waiver of fees for services incurred after the effective date of the agency action. A question posed here was whether services at the agency level were sufficiently related to the appeal to be included within the waiver. Analyzing Congressional purpose underlying § 7701(g) and the scope of companion fee provision in § 5596 of the Back Pay Act, the Board said it was indicated that Congress intended the Board to include fees for time spent contesting the proposed action before the employing agency.

Since attorney fee awards under both § 5596 and § 7701(g) are based on the standard in § 7701(g), the Board said it could not conclude that Congress intended to allow employing agencies to award fees for pre-appeal services but did not intend to authorize the Board to do so.

The Board concluded that in requiring it in § 7701(g) and § 5596 to use the standards in 42 U.S.C. § 2000e-5(k) in cases where the Board's decision is based on a finding of discrimination, Congress intended such awards to include fees for contesting at the agency level. Further, the Board noted that the legislative history indicated that Congress viewed costs and fees as separate expenses. Thus, both the Board and the courts have found that when Congress authorized the Board to award fees, it did not

authorize awards of those expenses considered to be taxable costs. Therefore, the Board found no persuasive reason to conclude that the ban in the Senate Report on the payment of the representation costs should be read to prohibit an award of attorney fees in the pre-appeal stage.

The Board concluded that construing the attorney fee provisions in §§ 5596 and 7701(g)(1) and (2) to authorize an award of fees incurred by an appellant at the agency level was more in keeping with the statute and Congressional intent than a contrary interpretation.

Considering the second issue specified above, the Board said that the proposed removal and the demotion were in substance the same action. Had the agency not mitigated the penalty, the action appealed would have been a removal. Therefore, the Board found no grounds for denying fees incurred in connection with the proposed removal. To preclude an award of fees when an agency mitigates the penalty would be to penalize the appellant for achieving a reduction of the penalty. This would clearly discourage appellants from trying to resolve their cases before the agency, since the agency could avoid any liability for fees incurred at this stage by mitigation. Moreover, the Board said that an appellant's designation of different representatives before the agency and the Board had no bearing on the eligibility for fee awards. Thus, the Board concluded that it has authority to award fees which an appellant incurs in contesting a proposed action which is later mitigated and appealed to the Board.

Next, the Board pointed out that to establish an entitlement to an attorney fees award, an appellant must prove that fees were incurred in connection with

an appealable action; that he or she is the prevailing party; that the award is in the interest of justice; and that the claimed fees are reasonable.

Here, the Board concluded a fee award was appropriate. As to the reasonableness of the claim, the Board agreed with appellant's contention that it erred in affirming the presiding official's ruling that the attorney's bill was not sufficiently specific. It found the claimed attorney fees of \$1500 reasonable.

Accordingly, the Board reversed its final attorney fee decision in this appeal and the initial addendum decision and ordered the agency to pay appellant's former attorney.

Thomas M. Eagan v. Department of the Navy
SE07528310257
August 5, 1985

Appellant was removed because he was unable to obtain a required security clearance. The presiding official found that the agency had not established that its denial of the clearance was reasonable and therefore reversed the agency action.

This case, and a number of others pending before the Board, raised significant issues of law relating to appeals of actions taken under 5 U.S.C. § 7511 *et seq.* and based on the agency's revocation or denial of the employee's security clearance. Consequently, the Board solicited *amicus* briefs and received some 12 briefs.

Addressing the first issue, the scope of its authority, the Board held in this lead case that in an adverse action over which it has jurisdiction and which is based substantially on the agency's revocation or denial of a security clearance, it had no authority to review the agency's stated reasons for the security clearance

determination. However, the Board will review the procedures utilized by the agency to ensure that the agency afforded the appellant procedural due process. The Board further held that the minimal due process rights that must be afforded the employee upon the agency's denial or revocation of a security clearance are: Notice of the denial or revocation; a statement of the reason(s) upon which the negative decision was based; and an opportunity to respond.

The nature of the Board's review in such cases, therefore, will be limited to determining that the agency has established the following: (1) the requirement of a security clearance for the position in question; (2) the loss or denial of the security clearance; (3) and the granting of minimal due process protections to the employee.

Similarly, the Board held that its scope of authority does not extend to ordering the agency to reinstate an employee's security clearance.

The Board then considered the following: When an agency wishes to base an action listed in 5 U.S.C. § 7512 on the revocation of a security clearance, may it do so pursuant to 5 U.S.C. § 7513, or is 5 U.S.C. § 7532 the exclusive basis? The Board relied on *Cole v. Young*, 351 U.S. 536, 546 (1956), in holding that 5 U.S.C. § 7532 is not the exclusive basis for removals based on security clearance revocations. The implication of the court's holding in that case was that both sections 7512 and 7532 can be used.

Next the Board considered: If it may not order reinstatement of a clearance, what alternative remedies may it order? It held that where the agency has failed to afford an appellant procedural due process rights in a negative security clearance determination, its action is not in accordance

with law, and the appropriate remedy is to reverse the adverse action and to order the agency to restore the appellant to pay status. If the agency elects to re-initiate the adverse action based on the negative security clearance determination, the agency must demonstrate that the position in question required a security clearance, that the security clearance was denied or revoked and that it afforded the employee the minimal due process protections consistent with the holding above.

In this case, the Board found that the agency supported the reasons for its action by a preponderance of the evidence and that the removal action would promote the efficiency of the service.

The initial decision was reversed and the agency's action sustained.

Jeffery K. Hatfield v.
Department of the Interior
DC07528510114
August 23, 1985

In 1984, the agency removed appellant, a GS-11, to correct his erroneous appointment to the position of supervisory grants specialist, GS-9, on September 22, 1982.

Appellant had received an appointment as a GS-3 on September 19, 1982. Resigning this on September 21, he was reinstated on September 22 as a GS-9.

The presiding official found that the September 22 appointment violated 5 C.F.R. § 330.501, which includes the provision that an agency may reinstate a former employee to a higher grade or different line of work only after three months have elapsed since the employee's latest non-temporary competitive appointment. She also found that the appointment violated 5 C.F.R.

§ 330.502. She determined that appellant's removal promoted the efficiency of the service because the grounds for it, the erroneous appointment, related to the legitimate governmental interest of protection of merit system principles.

The Board agreed with the presiding official's conclusion that the government has a legitimate interest in protecting the competitive process. Moreover, the Board noted, the Office of Personnel Management had certified two candidates who were eligible for the grants position from the displaced employee list. Thus, the erroneous appointment not only detrimentally affected the integrity of the system in general, but harmed particular employees by preventing them from competing for the position. The Board found, therefore, that the agency's action promoted the efficiency of the service. It denied the petition for review.

Johnny C. Johnson v. Department
of the Army
AT07528510374
August 27, 1985

Appellant was to be removed from his intermittent, when-actually-employed position on charges of absence without leave, but submitted his resignation, and the removal never took place. He then appealed the removal, not mentioning his resignation and declining an oral hearing.

The presiding official issued an order closing the record using the following language: "The purpose of this order is to provide the parties with a final opportunity to submit additional evidence or argument before the record in this case closes. Any party desiring to submit such evidence or argument must serve a copy . . . upon the presiding official and the opposing party within 15 days from the date of this order."

The presiding official then found that, because appellant had not shown that his resignation was involuntary, he had not been subjected to an appealable adverse action and therefore dismissed the appeal.

Denying appellant's petition for review, the Board reopened on its own motion.

It found that although the jurisdictional question of whether or not appellant's resignation was involuntary was raised by the agency in its response to the appeal, it was evident that the presiding official's order closing the record did not clearly apprise appellant of what he must specifically show in order to establish the Board's appellate jurisdiction; nor, in fact, did it generally inform him that there was a threshold jurisdictional question to be decided, and that his appeal would be dismissed absent a clear factual showing from him. *See Burgess v. Merit Systems Protection Board*, 758 F.2d 641 (Fed. Cir. 1985).

Vacating the initial decision, the Board remanded the case to the regional office to afford appellant an opportunity to demonstrate specifically that his resignation was involuntary and that the Board thus has jurisdiction to adjudicate his appeal on its merits.

Billy W. Lewis v. Department of
the Air Force
AT07528510017
August 7, 1985

Appellant petitioned for appeal from an action removing him based on charges of giving away government property to an unauthorized non-government employee and allowing that person to work on an Air Force job; submitting a false travel voucher and encouraging subordinates to submit intentionally false travel

vouchers; threatening reprisal; and violating the provisions of a policy letter by allowing employees to disconnect hot line clamps from an energized circuit without permission.

The presiding official held that the agency had not proven by a preponderance of the evidence that the appellant submitted a false travel voucher or that he threatened reprisal and retaliation. He held that the remaining charges were proven and sustained the removal, holding that the penalty was not beyond the bounds of reasonableness for the sustained charges.

However, the Board found, under the circumstances of this case, that the penalty of removal was beyond the bounds of reasonableness for the sustained charges. The Board found that the appellant proved circumstances which substantially abated the potential seriousness of the sustained charges. The Board also noted that the appellant had no prior record and performed his duties satisfactorily and dependably. Thus, the Board found the appellant to demonstrate considerable potential for rehabilitation. Accordingly, the Board found a 60-day suspension to be the maximum reasonable penalty, and so ordered.

In re Alfred D. Maisto
SF07528411054COMP
August 6, 1985

This case arose from a claim by a witness who testified in *Maisto v. United States Postal Service*, MSPB Docket No. SF07528411054, that the agency had not properly reimbursed him for appearing.

The presiding official, citing 5 C.F.R. § 1201.34, ordered the

agency to ensure that all the witnesses who testified at the hearing were in official duty status at the time, and that they were properly compensated for the period of time beginning when they left the agency to travel to the hearing, and ending when they arrived at their place of employment after being excused from the hearing by the presiding official. In response, the agency argued that it interpreted this regulation to apply only to the actual time spent testifying, not the time spent traveling and waiting to testify. The agency informed the Board that it “respectfully declines to comply with your Order, unless or until you cite appropriate authorities in support of your interpretation of the aforesaid CFR section.”

The regional director responded with an order citing statutes and the Federal Personnel Manual which supported the presiding official’s order, found the agency to be in noncompliance and ordered compliance within seven days. When the agency responded 22 days later, it said that its practice was to pay testifying employees as though they were in a duty status only when the testimony took place during the employee’s tour of duty. It argued that this witness had already completed his tour of duty for the day in question.

In its analysis, the Board noted that since the agency agreed that it must reimburse the witness for time he spent testifying, the issue was narrowed to whether he must be paid for the other time.

As the regional director noted, 5 U.S.C. § 1205(b)(3) requires that witnesses subpoenaed to Board hearings be compensated in the same manner as those subpoenaed to United States courts. That manner is set out at 28 U.S.C. § 1821(b) which states that witnesses are to be paid for travel

time as well as “... any time during such attendance.” (emphasis added).

However, the agency’s main argument was that the Board lacked jurisdiction, since the agency argued that it was not covered by the Civil Service Reform Act of 1978 and that the Board only has jurisdiction over preference eligibles with a year of continuous service.

The Board found the agency’s reasoning erroneous, stating that its jurisdiction over the appeal was undisputed and the assertion of that jurisdiction included authority to conduct a hearing and to govern the presentation of witness testimony where it is required for proper adjudication. 5 U.S.C. § 1205(a)(1). It went on to say that 5 U.S.C. § 1205(a)(2) was meant to confer on the Board a broad grant of enforcement power. *Kerr v. National Endowment for the Arts*. 726 F.2d 730, 733 (Fed. Cir. 1984). Moreover, the Board has the authority to prescribe regulations necessary for the performance of its functions. Consequently, the Board said it had the authority to prescribe regulations concerning witness fees and to enforce the Postal Service’s compliance with an order or decision regarding witness fees.

The Board said that where, as here, an employee of a federal agency, including an employee of the Postal Service, is a witness at a Board hearing during his non-duty hours, he is entitled to overtime pay he would have received had he worked in his regular position that day.

The Board ordered the agency to place the witness in official duty status for the travel time to and from the hearing, any time spent waiting to testify, and to compensate him for such time as well as expenses incurred by the actual transportation.

Dorothy D. Miller v. Department of Justice
AT07528310917ADD
August 22, 1985

Appellant petitioned for review of the initial addendum decision which denied her motion for attorney fees. She had been removed for absence without leave (AWOL) following the exhaustion of her leave, advance sick leave and leave without pay (LWOP). Following the proposal to remove, appellant applied for disability retirement but did not furnish medical documentation until after the removal decision had been made.

When appellant appealed to the Board, various attempts at settlement were made but the agency would not agree to pay attorney fees, and appellant would not agree to any type of settlement without attorney fees. Shortly before the hearing, the agency unilaterally rescinded appellant's removal and restored her to the rolls in an LWOP status as of the date of her disability retirement application pending a determination on that application. This did not have any effect on the AWOL charged prior to the proposal to remove, however.

Appellant chose to pursue the appeal and the hearing went forward. On the morning of the second day, appellant determined that restoration to the rolls in an LWOP status satisfied her reason for bringing the appeal. She advised the presiding official that she considered the case moot and that she did not want a decision. The presiding official dismissed the appeal as moot and then appellant filed a motion for attorney fees which the presiding official denied.

The Board found that appellant was accorded all the rights she was entitled to. The Board observed that merely withdrawing

an appeal while the hearing is in progress does not, in and of itself, satisfy appellant's burden of proving that an award of attorney fees is warranted in the interest of justice. At that point, appellant was under no duress or obligation to withdraw the appeal, as an initial decision could have been rendered on the merits.

Appellant's contention—after a day of testimony—that she had prevailed on the merits was found to be suspect since the agency reinstated her to the rolls before the hearing, and no change in the *status quo* occurred at the hearing to precipitate that conclusion.

The Board noted that the presiding official considered the fee request under the interest of justice criteria, and appellant's contention on appeal was essentially a disagreement with the presiding official's findings and evaluation of the evidence. The Board found no evidence tending to show that the presiding official erred. It denied the appellant's petition for review.

Kenneth G. Moen v. Department of Transportation, Federal Aviation Administration
Office of the Special Counsel,
Intervenor
SF07528411170
August 14, 1985

Appellant, an air traffic control specialist (ATCS) was suspended for 45 days on charges that he used marijuana at least once in 1983, while serving as an ATCS, and that he concealed or misrepresented that material fact while under oath. The charges were based on positive results of laboratory analyses of a urine specimen and on the affidavits of a fellow ATCS who said he had seen appellant smoke marijuana in an off-duty social setting.

Accepting appellant's arguments that the identification of the urine specimen was flawed and that the co-worker had retracted his affidavits, the presiding official found the agency had failed to support its charges by preponderant evidence. He ordered the suspension cancelled. Both the agency and the Board's Office of the Special Counsel (OSC) petitioned for review.

Regarding the agency's petition, the Board said that supporting statements submitted were clearly not unavailable before the record closed. Therefore, it did not grant the petition. Regarding the OSC petition as intervenor, which took exception to the presiding official's finding that appellant's co-worker retracted his statement, the Board agreed that the presiding official was wrong to call a later statement a retraction. Rather, the Board said that in the brief unsworn statement, the co-worker technically refined the language of his previous sworn affidavits, but did not forswear or contradict them. It noted that the affidavits served the same purpose as that of live testimony under oath. *Copeland v. Community Services Administration*, 7 MSPB 239, 240 (1981).

Therefore, the Board concluded that an unsworn handwritten note signed by the co-worker at appellant's request did not retract or outweigh his two previous affidavits implicating appellant in the charged marijuana use. It found that the agency had proven by preponderant evidence both the misconduct and appellant's giving false information regarding that misconduct to the agency's investigator. Finding that the 45-day suspension was reasonable, it reversed the initial decision and sustained the agency's suspension.

**Kelvin I. Myers v. Department of
the Air Force**
SF07528510176
August 7, 1985

On appellant's third offense of failure to honor a valid denial of leave request and unauthorized absence for eight hours, the agency removed appellant and the presiding official upheld the agency action.

In petitioning the Board for review, appellant contended that before issuing its decision, the agency knew or should have known that he was addicted to drugs. The Board pointed to *Clemons v. Department of the Army*, MSPB Docket No. DC07528310099 at 2 (June 7, 1984) where it ruled that in order to establish the affirmative defense of handicap discrimination, the employee must show that the handicapping condition caused the conduct. In this case, it said the record tended to support appellant's allegation that he had a drug problem, but appellant failed to prove that his drug use caused his unauthorized absence. And, although appellant testified that his drug use caused problems at work, he also attributed his problems to marital difficulties, and his supervisors—trained to recognize drug abuse—testified that they saw no symptoms in appellant. Because appellant failed to show that his drug use caused the conduct at issue, the Board said he did not establish his affirmative defense.

Appellant also contended that the proposing official violated Air Force regulations in the removal. The Board noted that, while an agency must follow its regulations, the appellant has the burden of proving that the agency committed harmful error by failing to do so.

In this case, the Board found that appellant did not so prove. It denied appellant's petition for

review for failing to meet the criteria set forth at 5 C.F.R. § 1201.115.

**Robert L. Robinson v. U.S. Postal
Service**
PH07528410607
August 23, 1985

The agency petitioned for review of an initial decision which reversed appellant's removal from his letter carrier position, based on a finding that the agency's violation of the applicable collective bargaining agreement constituted harmful error.

On July 5, 1984, two postal supervisors opened appellant's locker, looking for health insurance forms for one of the supervisors who had allegedly injured his hand. The supervisors believed the forms might be in the locker since appellant was a union steward. Instead of the forms, the supervisors found 1,314 pieces of mail, two of which were first class mail postmarked August 5 and September 27, 1983. The agency subsequently removed appellant for obstructing the mail.

The Board had previously determined that where the provisions of a collective bargaining agreement establish non-discretionary policy under which an agency operates, the Board shall treat the provisions of the agreement in the same way as the provisions of the agency's regulations. The Board will, therefore, enforce employee rights derived from such a negotiated agreement.

The Board noted that the Postal Service had a valid interest in ensuring the safety of the mails and in discovering theft, and that this interest does not end at the door to the lockers which the service provides its employees. Thus, courts have recognized that the public's interest in the integrity of the mail greatly

outweighs the employee's private interest in the "very restricted and regulated employment related use" of his locker. The Board therefore concluded that, absent some limiting provision, an agency has the right to enter its employees' lockers for a proper reason.

The collective bargaining agreement provided that "... except in matters where there is a reasonable cause to suspect criminal activity, postal management or inspectors shall not inspect lockers unless the employee or the union representative has been given the opportunity to be present." In this case, there was no assertion that the agency had reasonable cause to suspect criminal activity; nor was the inspection part of a general inspection. The Board concluded that a union representative or the appellant should have been given the opportunity to be present. Because that did not occur, the Board agreed with the presiding official that the agency committed an error.

The Board found, however, that the appellant did not meet his burden of showing that the error was harmful because he did not demonstrate that, had the agency followed the procedure called for in the contract, the outcome of the case would have been different. The Board noted that the recent Supreme Court decision in *Cornelius v. Nutt*, 53 U.S.L.W. 4837 (U.S. June 24, 1985) supported its conclusion that agency violations of collective bargaining agreements must be harmful to constitute reversible error.

Considering factors set out in *Douglas v. Veterans Administration*, (5 MSPB 313 (1982)) the Board found that removal was an excessive penalty. It affirmed the initial decision as to the charge, reversed as to the finding of harmful error and

modified the penalty to a 45-day suspension.

Gerald E. Smith v. Department of Justice
AT07528410931COMP
August 27, 1985

On order from the Board, the agency cancelled appellant's removal and substituted a suspension. Although not so ordered, it also reassigned appellant from Georgia to West Virginia. When the Board issued an enforcement order, the agency rescinded that assignment and placed appellant on "home duty," that is, it assigned him to stay at home and complete tasks as assigned. Then, it notified appellant that he was being reassigned to New York State.

When the agency did not comply with the regional director's recommendation which found it in noncompliance with the Board's order, the director referred the case to the full Board. The agency thereupon argued, in its response to the Board's show cause order, that the regional director incorrectly applied *Kerr v. National Endowment for the Arts*, 726 F. 2d (Fed. Cir. 1984). In *Kerr*, the court held the Board to be obligated to ensure compliance with its orders and that—in case of the cancellation of a removal—compliance required a return of appellant as nearly as possible to his previous status. The agency argued that appellant's reassignment was to a virtually identical position, the only difference being the location of the assignments, and therefore, the *Kerr* requirement was met.

The Board rejected this argument. It said that a return "as nearly as possible" to the previous status would ordinarily be a return to exactly the same position and that the agency must justify why that return did not occur.

The Board agreed with the presiding official in finding not valid the agency's reasons for not returning appellant to his previous position. Accordingly, it found that the agency had not complied with its order and ordered the appellant returned to the position he occupied before his wrongful removal.

Claude H. Thomas v. Veterans Administration
BN0752183C9053
August 22, 1985

In this case, appellant petitioned for review of an initial decision on compliance. The regional director had dismissed appellant's appeal, noting that the agency had complied, albeit late, with a Board order which cancelled appellant's removal and provided backpay and benefits. In that dismissal, appellant's request for interest on backpay was also rejected.

In considering appellant's petition for review, the Board found, consistent with the principles applied generally by those courts which have spoken on the issue, that interest on backpay may not be awarded by the MSPB under the Back Pay Act or the Veterans Preference Act, contrary to the appellant's contentions.

The Board also found no authority for the MSPB to award such interest as a general sanction under 5 C.F.R. § 1201.43 for failure to prosecute an appeal, to comply with a Board order, or to make a timely filing, nor under 5 C.F.R. § 1201.84 as a compliance enforcement measure. *See generally, United States v. Testan*, 424 U.S. 392 (1976); *Accord Fitzgerald v. Staats*, 578 F. 2d 435 (D.C. Cir. 1978), cert. denied, 439 U.S. 1004 (1978).

Accordingly, the Board affirmed the regional director's decision, as modified by this order.

William R. Wilburn, III v. U.S. Postal Service
SF07528510198
August 8, 1985

Appellant petitioned for review of an initial decision which sustained his removal based on a charge of physical assault on another employee.

The presiding official had sustained the charge based on his finding that although appellant was provoked by a racial epithet directed at him by his co-worker, his response was not justified.

The Board noted the agency's policy permitting consideration of provocation as a mitigating factor in a case of assault, as well as its own holding that provocation by the victim of an assault is a mitigating factor in assessing an appropriate penalty. The Board also noted that while each case is different, it has generally held that a suspension is an appropriate penalty in cases involving physical altercations which neither result in serious injury nor involve the use of weapons when the employee has a history of satisfactory performance, when the agency does not rely on a prior disciplinary record in selecting the penalty, and when there is an element of provocation.

In this case, the Board ordered the agency to cancel the removal and substitute a 60-day suspension.

PERFORMANCE

Faye L. Macie v. Department of the Air Force
AT04328310857
August 21, 1985

This case is representative of the five performance-related cases which the Board issued this month. They involved the issue of whether the agencies took actions against the appellants pursuant

to an Office of Personnel Management (OPM) approved performance appraisal system covering the appellants' positions. In each case, the Board discussed, among other things, whether record evidence is sufficient to establish the agency's burden under *Griffin v. Department of the Army*, 23 MSPR 657 (1984). The other cases were *Harold F. Renshaw v. Department of the Army*, PH531D8210145-1, August 21, 1985; *Roberto P. Salonga v. Department of the Army*, SF04328310110, August 21, 1985; *Clyde J. Shorter v. Department of the Army*, AT04328310036, August 21, 1985; *David E. Wapinski v. Department of the Army*, SF04328410049, August 21, 1985.

In this case, appellant petitioned the Board to review the initial decision which affirmed her removal. The Board remanded to the regional office to determine whether removal took place under an OPM-approved performance appraisal system. There, the presiding official found that the agency proved by substantial evidence that it used an approved system.

Appellant included in her petition the argument that the issue of OPM approval had already been raised in the first proceeding. Therefore, she claimed that the presiding official erred in not determining—based on the record—whether the agency proved by substantial evidence that OPM had approved the applicable system.

The presiding official's initial order directing the agency to respond and defend appellant's petition for appeal contained an attachment pertaining to the production of documents in an appeal from an action based on unacceptable performance. Item 11 of the attachment directed the agency to submit "[e]vidence that the agency has an OPM-approved performance system,

and evidence of the performance standards, if any, applicable to appellant's position." As the Board noted in *Griffin* (663), "to the extent that presiding officials may not have done so in the past, in exercising their discretionary authority to control appellate proceedings under 5 C.F.R. § 1201.41(b), they may require proof of an OPM-approved appraisal system at the outset of an appeal in the interest of adjudicatory economy because without such proof the action under Chapter 43 must fail."

The Board found that the inclusion in the initial order of item 11 of the attachment was the kind of initiative by presiding officials contemplated by *Griffin*. The Board also concluded that the issue was raised before the regional office in such a manner that the parties had an opportunity to address it.

Accordingly, the Board concluded that the presiding official erred in finding that the issue had not been previously raised and in failing to resolve the issue based on the existing record. The record prior to the remand contained Air Force regulation 40-452, paragraph 1-2, stating that the agency's performance appraisal system met the statutory requirements of the Civil Service Reform Act of 1978 and OPM regulations. As it had held in *Shorter*, the Board noted that the foregoing agency regulation, in the absence of challenge, was sufficient to establish OPM approval of the agency's performance appraisal system.

The Board affirmed as modified the supplemental initial decision in this case.

**Ruth L. Riddick v. Office of
Personnel Management**
DC04328510088
August 19, 1985

OPM asked the Board to stay enforcement of a Board order

pending the outcome of an OPM petition for judicial review. The order in question had found that the Board had jurisdiction and remanded the case to the regional office for adjudication on the merits.

Appellant had appealed her removal for unacceptable performance. But the presiding official dismissed, finding that under 5 U.S.C. § 7121(e), appellant had lost her right of appeal because she had previously grieved the removal under the negotiated procedure. However, when appellant petitioned for review, the Board noted that she had grieved the removal on October 31, 1984, but that the effective date of the removal was November 2, 1984 when an appealable action occurred. Appellant appealed to the MSPB's regional office on November 22, 1984. Since that was the first action she took after the effective date of the removal, she elected under section 7121(d) to appeal to the Board. Therefore, the Board held that it had jurisdiction over the appeal, vacated the presiding official's decision and remanded the case.

The Board discussed the conditions under which it may stay the enforcement of a final decision pending judicial review, listing the four criteria it uses. They are: (1) the likelihood that OPM will succeed on the merits on petition for judicial review; (2) irreparable injury to the moving party; (3) substantial harm to other parties interested in the proceedings; and (4) the public interest. The Board weighs the likelihood of success against the other three criteria. Where the last three criteria strongly favor the granting of a stay, a stay will be granted if a serious legal question exists on the merits. If the last three criteria give slight support for a stay, however, a stay will be granted only if the likelihood for success is strong.

Applying the first criterion, the Board found that OPM's contention that the MSPB order violated section 7121 lacked merit. OPM contended that the Board's finding that an employee cannot make an election until the agency action's effective date allows the employee to contest under both the negotiated bargaining agreement and the MSPB procedures in violation of section 7121. The Board pointed out that although the appellant could grieve a proposed action, she could only appeal to the Board after effective date of the action. Before that time, no election could be made because no alternative existed.

As to OPM's assertion that a stay would not harm appellant because—should she prevail—she would be entitled to retroactive reinstatement with pay, and that the public interest would be served by deferring the enforcement of the Board's order, the Board said that further delay would harm appellant and that the public interest would be served by going forward.

Ruling that OPM had not shown that its opposition to the Board's decision was likely to succeed on the merits, or that a serious legal question was presented, and also that OPM had not shown that it would suffer irreparable harm if a stay were denied or that the interest of the appellant and the public would not be harmed if a stay were granted, the Board denied OPM's request for a stay.

RETIREMENT

**Douglas R. Jacobsen v. Office of
Personnel Management**
SF08318410726
August 6, 1985

This case was before the Board on the petition of OPM for reconsideration of the Board's

decision of February 21, 1985. Appellant is the surviving spouse of a deceased federal employee who received erroneous information concerning survivor benefits prior to her retirement and elected not to provide a spouse's survivor annuity. The erroneous information, which was printed on the application completed by appellant's first wife in 1975, indicated that if she elected to receive an annuity with a survivor benefit, her annuity would not be increased if her husband died before she did. Appellant's first wife died in 1981 and appellant remarried in 1982 at the age of 58. Four months later, appellant received notice from OPM of his right to change his first wife's election. He made the change and received retroactive survivor benefits for the period from his first wife's death to his remarriage. However, OPM denied his request for continuation of survivor benefits beyond the date of his remarriage in a reconsideration decision which appellant appealed to the Board. The presiding official affirmed OPM's decision.

On petition for review, the Board reversed OPM's decision and concluded that, in light of (1) agency's failure to provide adequate notice of the correct information to appellant and (2) appellant's undisputed assertion that he would have elected to postpone his remarriage until his 60th birthday, OPM improperly terminated his survivor benefits.

Regarding OPM's reconsideration request, the Board has held that when OPM has participated in a Board proceeding, either as an intervenor or—as here—as an original party, the director of OPM is not entitled to reconsideration. *O'Brien v. OPM*. 23 M.S.P.R. 579, 580 (1984). Accordingly, since OPM was an original party, its petition was denied.

Separate Opinion of Chairman Ellingwood, Concurring in Part and Dissenting in Part

The Chairman said that while he concurred in the majority's denial of OPM's petition for reconsideration under *O'Brien*, he would reopen the case *sua sponte* pursuant to 5 C.F.R. § 1201.117, vacate the Board's February opinion and order, and affirm the initial decision and OPM's decision. In light of the absolute statutory prohibition against continuing the payment of survivor annuity benefits to a surviving spouse who remarries before the age of 60, he concluded that the decision of OPM affirming the termination of appellant's survivor annuity benefit on the last day of the month before he remarried should be affirmed.

**Paul B. Morgan v. Office of
Personnel Management**
DC08318510132
August 12, 1985

Earning capacity is restored if an annuitant's income from wages and/or self-employment equals 80 percent of the current rate of pay for the position from which annuitant retired. 5 U.S.C. § 8337(d). Here, the agency stopped his disability retirement annuity and determined that he had been restored to earning capacity when appellant reported earning \$47,155 in 1983. Eighty percent of the current rate of the relevant position was only \$46,000.

The presiding official sustained the agency action. She found that appellant earned \$41,799, and the only contested amount was the remaining \$5,356. Appellant originally reported the latter amount to the agency as income from self-employment, but then amended his income tax return,

changing that amount to \$3,605. Because the Internal Revenue Service (IRS) accepted this amendment, appellant contended that his income should have been reported as \$45,404, and therefore his annuity should not have ended.

However, it was the presiding official's conclusion that appellant did not sustain his burden of proving his entitlement. She noted that appellant was required to report any "net profit" from self-employment, defined by the agency as the amount remaining after deducting business expenses and before deducting any personal expenses or exemptions allowed by the IRS. She found appellant's testimony concerning the return did not show the reduction should be attributed to business expenses.

Granting appellant's petition for review, the Board found that appellant had established that the reduction in his income from self-employment was due to business expenses. The Board declined to apply the agency's interpretation of the statute which was that amounts offset as business expenses for tax purposes should not necessarily be offset from income when determining earning capacity under 5 U.S.C. § 8337(d).

It found that appellant sustained his burden of proving his income was below the current rate of pay for the relevant position and that he was therefore entitled to a continued disability retirement annuity.

SUITABILITY

Roland P. DeAngelis v. Office of
Personnel Management
BN07318510044
August 12, 1985

OPM directed the Department of the Navy to remove appellant from his position of mechanical engineer when it determined that

he did not meet the suitability requirements for federal service. Further, it barred him from competitive federal service until July 27, 1987. These actions were based on OPM's determination that appellant listed in an attachment to his application for employment grades higher than he actually had received. The presiding official reversed the action since she found that—based on appellant's work record and his supervisor's recommendation—rating appellant unsuitable did not promote the efficiency of the service.

When the agency petitioned for review, it argued that the presiding official had improperly relied on appellant's subsequent exemplary work record. The Board noted that it has consistently held that performance in a position to which an employee has been appointed as a result of falsification has no relevance to a falsification charge. *McCreary v. Office of Personnel Management*, 27 MSPR 459 (1985); *Warner v. Department of the Navy*, 4 MSPB 425 (1980). It noted further that the 11 courses in which appellant indicated that he received an average grade of "C" rather than a barely passing grade of "D" were engineering-related. Therefore, it found the rating of unsuitable appropriate since the admitted falsification raised serious doubts about appellant's honesty and fitness for employment.

The Board reversed the initial decision and affirmed OPM's determination.

William J. Schaefer v.
Immigration and Naturalization
Service
CH07318410069
August 15, 1985

In this case, the Board first denied the petition from the

Office of Personnel Management for reconsideration of a Board final order due to OPM's untimely filing.

It then went on to reopen and reconsider the case on its own motion pursuant to 5 C.F.R. § 1202.117. Earlier, the presiding official had ordered the Immigration and Naturalization Service (INS) to cancel an unsuitability rating of appellant (who was a job applicant) and "to place appellant in the position he would have obtained with the agency but for its issuance of the instant unsuitability rating." When the Board considered the petition for review, it affirmed that remedy and ordered INS to pay appellant backpay and benefits. In this order, however, it said that was not appropriate.

It said that when the Board reverses a negative suitability determination, the proper remedy is to order the agency both to cancel the unsuitability rating and to return the affected applicant to the eligibility list for employment. See *Mervar v. Office of Personnel Management*, 1 MSPB 298 (1980). In the case at hand, the Board's remedial language ordered INS to cancel the negative suitability determination and "retroactively place appellant in the position he would have obtained with the agency but for the issuance of the negative determination." It based its remedy on an agency official's testimony that at the time of appellant's application, the shortage of border patrol trainee applicants resulted in near-automatic elevation from eligible to appointee status. But the Board said that this specialized situation did not place appellant in a favored position—reversal of the negative suitability rating entitled him to be returned to the eligibility list, but appointment to a position is at the agency's discretion. Thus, the Board said it erred in construing the agency

testimony as conferring the status of an appointee on appellant. The appropriate remedy was for appellant to be placed on a list of eligibles for the border patrol agent (trainee). Moreover, the Board has determined that it is without authority under the Back Pay Act, 5 U.S.C. § 5596, to order backpay and benefits to an *applicant*. Section 5596 provides that, as a remedy for an improper personnel action, an *employee* is entitled to backpay and benefits.

The Board reversed its prior order and ordered INS to place appellant on a list of eligibles for the trainee border patrol position.

VOLUNTARY EXPEDITED APPEALS PROCEDURE

BUCKNER, Nathaniel S. v.
Department of the Army
(DA07528510409, August 28,

1985). Appellant was removed for misusing his government credit card. Considering certain factors and mitigating circumstances, the presiding official found removal unreasonably harsh a penalty, and reversed the action. He ordered the agency to substitute a five-day suspension. *Frederick B. Weller*, Presiding Official.

CLARK, Donald L. v. U.S. Postal Service (CH07528510500, August 23, 1985). Appellant was charged with failing to properly perform his duties. The action was affirmed. *Stephen E. Manrose*, Presiding Official.

GALLEGOS, Cosme E. v. Veterans Administration (CH07528510436, August 8, 1985). Appellant was removed based on his providing false information in connection with his claim for compensation due to alleged on-the-job injury. The

presiding official found the agency did not prove its case by preponderant evidence. He also found that appellant did not support with preponderant evidence his allegation of discrimination based on national origin. He reversed the agency action. *Phillip Miller*, Presiding Official.

HAWKINS, Elijah, Sr. v. Department of the Navy (SF07528510744, August 15, 1985). Appellant withdrew his appeal of his removal, based on a settlement agreement. The case was dismissed. *Samuel A. Vitaro*, Presiding Official.

LEE, Rick A. v. Department of the Navy (SF07528510883, August 22, 1985). Appellant informed the Board that he had erred in filing an appeal of his termination and that he wished to withdraw it. The request was granted and the appeal dismissed. *Gretchen W. Thomas*, Presiding Official.

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- ADER, Preston M. v. Office of Personnel Management (PH08318510169, August 12, 1985)
- ALEXANDER, Gerald v. Department of the Navy (DC0752831031OADD and DC07528310948ADD, August 15, 1985)
- BAKER, Lawrence v. Defense Logistics Agency (CH04328410309, August 29, 1985)
- BARNARD, Stephen P. v. Defense Investigative Service (BN07528510067, August 22, 1985)
- BATTLE, Leroy W., Sr. v. Department of Labor (AT07528510311, August 22, 1985)
- BERG, William v. U.S. Postal Service (DE07528510049, August 23, 1985)
- BERGSTeIN, Lawrence E. v. U.S. Postal Service (PH07528410506-1, August 8, 1985)
- BISHOP, Harold C. v. Defense Logistics Agency (SF07528510330, August 12, 1985)
- BLAKE, Vetra L. v. Department of the Air Force (DA07528510099, August 7, 1985)
- BOGDANOWICZ, Ralph B. v. Department of the Army (PH07528110587REM, August 8, 1985)
- BOHLKEN, Frederic C. v. Department of the Air Force (DE04328410119ADD, August 12, 1985)
- BONILLA, Joseph F. v. Office of Personnel Management (SF08318510336, August 8, 1985)
- BONVILLE, Eugene J. v. Department of the Army (NY04328410172, August 21, 1985)
- BRITTAIN, Rosemary L. v. Department of the Navy (SE07528510049, August 15, 1985)
- BROADNAX, Frank v. U.S. Postal Service (SF075279A9001, August 12, 1985)
- BROWN, Larry D. v. Department of the Navy (PH07528510193, August 23, 1985)
- BROWN, Randolph R. v. Department of the Army (PH0432810568, August 21, 1985)
- CAIN, Wilbur R. v. Veterans Administration (AT07528510215, August 6, 1985)
- CALLAN, Patricia A. v. Department of the Navy (AT531D8410094 and AT04328410267, August 21, 1985)
- CHANDLER, George W. Jr. v. Department of the Navy (SF03518510332, August 6, 1985)
- CHRISTENHUSZ, Olga R. v. Department of the Army (CH04328510126, August 19, 1985)
- CLARK, James C. v. Department of the Army (AT07528510196, August 8, 1985)
- CLARK, James H. v. Department of Agriculture (DA07528510101, August 22, 1985)
- COOK, Eleanor E. v. Officer of Personnel Management (SL08318510061, August 12, 1985)
- CULBERT, Jon A. v. Department of Energy (DA03518510155, August 28, 1985)
- DAVIS, Georgia D. v. Department of Commerce, Bureau of the Census (DC03518210927, August 14, 1985)
- DAVIS, Madison v. Department of Agriculture (DA04328510077, August 23, 1985)
- DECKERT, David D. v. U.S. Postal Service (NY07528310613Comp, August 22, 1985)
- DICKMYER, Richard E. v. Department of the Treasury (AT04328510034, August 21, 1985)
- DIETZ, John R. v. Department of the Army (PH07528510156, August 22, 1985)
- DRAKE, Shelby v. Department of the Army (AT07528310851, August 8, 1985)
- DRIVER, Barbara J. v. Department of Justice (AT07528510426, August 27, 1985)
- FARRIS, Linda O. v. Office of Personnel Management (DA831L8510122, August 12, 1985)
- FAUST, Clavis A. v. Department of Agriculture (AT07528510188, August 7, 1985)
- FELDER, Annie L. v. Department of the Air Force (SF07528510387, August 29, 1985)
- FITZGERALD, Valerie M. v. Department of Defense (DC04328310676 and DC531D8310607, August 26, 1985)
- GALA, Donney T. v. Department of Justice, Federal Bureau of Prisons, (NY03538510270, August 27, 1985)
- GARAVENTA, Alwin R. v. Department of the Army (SF07528510359, August 8, 1985)
- GARDNER, Edith A. v. Office of Personnel Management (PH831L8510222, August 7, 1985)
- GERACOLIS, Peter G. v. U.S. Postal Service (BN07528510115, August 23, 1985)
- GIBSON, Judith A. v. Defense Mapping Agency (AT07528410438, August 28, 1985)
- GILLESPIE, Arthur C. v. Office of Personnel Management (NY831L8510136, August 12, 1985)
- GOOD, Elizabeth C. v. Department of the Interior (DC03518510120, August 29, 1985)
- GOODWIN, Ruth v. Department of the Army (AT04328210663, August 21, 1985)
- GRIFFIN, David W. v. Defense Mapping Agency (SL07528410150, August 8, 1985)
- GRUSZKA, Edward v. Department of Agriculture and Office of Personnel Management (BN34438520133, August 15, 1985)
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- HAMPTON, Eric L. v. U.S. Postal Service (CH07528510157, August 22, 1985)
- HANCOX, James L. v. Department of the Air Force (SL03307990002Comp, August 1, 1985)
- HAYWORTH, James v. U.S. Postal Service (SF07528510191, August 12, 1985)
- HECHT, Rachel R. v. Department of Justice (DC07528510244, August 19, 1985)
- HENSLEY, Roscoe L. v. Department of the Army (DC07528510185, August 19, 1985)
- HERNANDEZ, Vincent v. Office of Personnel Management (AT831L8510230, August 6, 1985)
- HICKS, Bobby J. v. U.S. Postal Service (SF07528510144, August 8, 1985)
- HOLMAN, Freddie E. v. Office of Personnel Management (DA08318510241, August 12, 1985)
- HYATT, Christopher W. v. Department of the Navy (SF07528510222, August 22, 1985)
- JACKSON, Lynell v. Department of the Army (AT07528510182, August 29, 1985)

JACKSON, Vincent E. v. Department of Defense (DC07528510226, August 12, 1985)

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SWIDECKI, Jamie B. v. U.S. Postal Service (SF07528510288, August 8, 1985)

TALLENT, Loyd H. v. Department of the Army (AT04328310561, August 21, 1985)

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WEST, Hugh D. v. Department of the Treasury (AT04328310381, August 29, 1985)

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WILSON, Gary G. v. Department of the Navy (SF04328410092, August 21, 1985)

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YARBERRY, Robert L. v. U.S. Department of Energy (DA07528510107, August 23, 1985)

YEAGER, Danise P. v. Department of the Treasury (SL07528510070, August 6, 1985)

Litigation

Mary L. Wilson v. Department of Health and Human Services

Appeal No. 85-1857

(Fed. Cir., August 21, 1985)

Sidney C. Jackson v.

Environmental Protection Agency

Appeal No. 85-1864

(Fed. Cir., August 21, 1985)

Both petitioners were demoted after they failed to achieve the minimally satisfactory level of proficiency in a critical element of their positions as specified by the relevant performance standards. Each contended that these performance standards failed to satisfy the statutory requirement that such standards be based on objective criteria, concluding that the standards were invalid and therefore their demotions could not be sustained.

The court framed the question presented as: What did Congress mean in 5 U.S.C. § 4302(b)(1) when it required that performance standards contain "objective" evaluation criteria permitting "accurate" job evaluation "to the maximum extent feasible"? As a sub-issue, the court also considered the proper measure by which it and the MSPB are to judge the sufficiency of contested standards.

The court noted that under the statute's objectivity requirement performance standards must be reasonable, sufficient in the circumstances to permit accurate measurement of employee's performance, and adequate to inform the employee of what is necessary to achieve a

satisfactory or acceptable rating. The petitioners did not disagree. However, they suggested that the government must provide its employees with precise quantitative or numerical standards. They contended that only such mathematical or percentage standards can completely remove subjective judgement from the evaluation process.

The court further stated that Congress desired standards sufficiently specific that compliance *vel non* with those standards could be verified in the particular instance by others than the official appraisers of the employee's performance. A standard should be sufficiently precise and specific as to invoke a general consensus as to its meaning and content. But the legislative language, the court found, does not suggest any necessary requirement for numerical measurement. Furthermore, Congress clearly expressed its intention to grant all agencies "great flexibility to choose or develop their own systems." This strong emphasis on flexibility runs directly counter to the rigidity of an obligation for numerical or quantitative standards.

The court, therefore, rejected any absolute rule regarding the formulation of performance standards (including that they pose a stringent numerical requirement).

In the *Wilson* case a critical element required that she "direct work activity—issue orders and

instructions on what, how and by whom action should be taken." The performance standard defined minimally acceptable performance for this activity as:

Coordinates controls, and directs activities of subordinate staff to insure adequate service to the public by appropriate management principles. Assignments and instructions to staff are hastily made and sometimes misunderstood. Direction of work activities is occasionally effective in achieving objectives.

The presiding official concluded that the standard was valid, and sustained the agency's action. The full Board declined review. The court ruled, however, that the standard could not be upheld as within the requirements of the Civil Service Reform Act of 1978. The court found the standard, as stated, to be so vague and inexact that it would be impossible to apply in a verifiable fashion or to discover the level of proficiency the agency actually intended. It is exactly the type of standard, the court noted, that leaves employees open to an arbitrary appraisal.

The court concluded, in the *Wilson* case, that the agency abused its discretion when it promulgated the performance standard which did not properly inform appellant of what was required to achieve an acceptable performance rating.

The court distinguished the case of *Lovshin v. Department of the Navy*, No. 84-1002 (Fed. Cir., June 21, 1985) (*en banc*), when the

agency suggested a remand of the case to the Board for consideration under Chapter 75 of Title 5. The court stated that in *Lovshin* the agency made a choice between two statutorily authorized procedures, while in this case the agency sought to completely alter the nature of the proceeding after the fact. However, the court left open the question of whether the agency might proceed with a Chapter 75 action against Wilson, beginning at the agency level and following the procedures required by that chapter, based on the same or similar set of facts. The court denied the agency's request for a remand.

In the *Jackson* case petitioner was responsible for reporting on seminars and meetings of permittees and licensees of both the Environmental Protection Agency and similar state and local agencies. A critical element required petitioner to:

Concisely define information needed for developing comprehensive reports. Establish format for obtaining and presenting information. Identify all available information resources and coordinate information development with other program offices. Verify accuracy of information presented. As example, write, edit and publish technical newsletter on relevant Agency and state permit assistance activities.

The corresponding standard required that:

Draft reports are completed in a timely manner, address all pertinent issues, and require minimum revisions.

Information developed and reported is coordinated with other relevant program offices. Recognize, report and recommend solutions to potential problems.

The court found the standard sufficiently objective and precise in the sense that most people would understand what it meant and what it required—and petitioner could adequately determine whether this was attained and exceeded. The standard reasonably informed petitioner of what and when he was to write. When he failed to meet the agency's expectations, he was informed of the specific tasks by which he could satisfy the agency's concerns. Petitioner then knew very precisely the level of proficiency he would have to achieve to retain his position. When he failed to complete those tasks in a satisfactory manner, the agency could properly take action.

Accordingly, the court reversed the Board's decision affirming the agency's action in *Wilson* and affirmed the Board's decision sustaining the agency's action in *Jackson*.

For Your Information

PUBLICATION SERVICES

The Digest

The Digest is a monthly publication containing summaries of Board orders and a list of other Board orders and issuances. It is available from the Superintendent of Documents, under stock number 062-000-80001-1, either by subscription or single issue. Please address subscription or purchase inquiries to: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20401.

Initial Decisions

Initial decisions made in the regional offices are available on a quarterly microfiche issuance, "Federal Employee Appeals Decisions." However, the July-September 1985 issuance will be the final one, since this project has been cancelled.

Published Board Decisions

Volumes 12 and 13 of *Decisions of the United States Merit Systems Protection Board* are available through the Superintendent of Documents. These volumes—compilations of final Board actions and precedential interlocutory decisions—include an index using the Board's key number system. Ordering information is: Volume 12 (covering the period October through

December 1982)—stock number 062-000-00017-1; \$16; and Volume 13 (January through March 1983)—stock number 062-000-00018-0; \$11.

Earlier Board decision volumes are out of print. With the printing of Volume 13 the Board discontinued publishing its decisions. However, readers are referred to the Board's notice in the *Federal Register* of March 4, 1985 (see 50 F.R. 8684) which lists organizations offering a variety of services regarding Board orders.

COPIES OF DECISIONS AND ORDERS

Copies of specific initial decisions and Board orders may be obtained by writing to the Information Services Division, Office of the Clerk of the Board, Merit Systems Protection Board, Room 828, 1120 Vermont Avenue, N.W., Washington, D.C. 20419. Requests should include the appellant's name, the docket number, and the date of the decision or order.

Persons interested in Board issuances are invited to visit the Information Services Division, Monday through Friday, 1 p.m. to 5 p.m., where the initial decisions, Board orders, publications, and microfiche described above are available for viewing.

DEFINITIONS

These definitions are provided for clarification purposes only and are not intended to convey

the strict legal meaning of the terms.

Addendum Decision—an addendum decision deals with attorney fees.

Deciding Official—the official who renders the agency's decision.

Initial Decision—the regional office decision made by the presiding official in response to a petition or appeal. The initial decision becomes final in 35 days unless a petition for review is filed with the Board and granted or the Board reopens on its own motion. In those cases, the Board's decision becomes the final decision. If the petition for review is denied, the initial decision becomes final five days after the issuance of the denial.

Petition for Appeal—the request filed with a Board regional office for review of an agency action.

Petition for Review—the request filed with the three-member Board in Washington, D.C., for review of an initial decision of a presiding official.

Presiding Official—any person designated by the Board to preside over any hearing or make a decision on the record. The presiding official referred to in *The Digest* summaries is usually a Board regional office official designated by the Board to perform these duties.

Proposing Official—the agency official who initiates an action to be taken against an employee.

Regional Office—the Board office authorized to receive appeals from the area where the

appellant's duty station was located when the agency action was taken. The Board has 11 regional offices.

Voluntary Expedited Appeals Procedure—a voluntary

alternative procedure designed to adjudicate relatively simple non-precedential appeals in an expedited, informal and cost-effective way, in accordance with Board precedent.

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